STATUS REPORTS FOR

STATE IAQ/ETS STANDARDS:

CALIFORNIA
FLORIDA
MARYLAND
MICHIGAN
OREGON
WASHINGTON

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Prepared by: Constangy, Brooks & Smith
February 24, 1994

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California

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CALIFORNIA OSHA'S IAQ EFFORTS

Status:

At a January 6, 1994 meeting of the California Division of Occupational Safety and Health (DOSH) Advisory Committee, the Chief of DOSH noted that the agency intended to "look at a 1994 intervention in the area of IAQ." He referred to the seventh draft of an IAQ complaint investigation procedure as the start of this 1994 "intervention." This IAQ complaint procedure, when finalized, will be added to the DOSH Policy and Procedure Manual. According to the draft, complaints alleging ETS exposure in workplaces covered by an applicable anti-smoking ordinance will be referred to the local government entity for investigation. Apparently, if there is no such local anti-smoking ordinance, DOSH will respond to the complaint under the general IAQ investigation procedures established in the draft.

DOSH plans to use this draft IAQ complaint investigation procedure to train staff. The draft will be critiqued during the training classes and finalized at the conclusion of those classes in March or April 1994. Comments on the draft may be submitted to DOSH prior to final adoption of the procedure.

The Chief of DOSH has also stated that DOSH plans to review "existing Cal-OSHA IAQ standards," apparently referring to those standards that touch on the IAQ issue. He noted that a number of those standards were "not up to current levels of understanding about this issue." He stated that DOSH may revise the standards, emphasizing that a final decision to revise has not yet been made.

Neither DOSH nor the Cal-OSHA Standards Board has begun the process of promulgating a comprehensive IAQ or ETS standard. Cal-OSHA's 1987 Minimum Ventilation Standard, which was promulgated in response to a petition for a comprehensive IAQ standard, remains in effect.

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CALIFORNIA

January 1994 —— Division of Occupational Safety and Health (DOSH) Advisory Committee meeting addresses IAQ complaint investigative procedure and expresses intent to "look at 1994 intervention in area of IAQ."

7th Draft of IAQ complaint procedure released.

Anticipated April 1994 —— Final IAQ complaint procedure adopted.

DOSH Review of existing standards that address IAQ.

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Florida

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FLORIDA DEPARTMENT OF LABOR'S
DRAFT IAQ/ETS STANDARD

Status:

The Florida Department of Labor's Safety Division has completed a draft indoor air quality (IAQ) standard. The draft currently restricts smoking to designated areas. It contains no requirement that the designated smoking areas be separately ventilated, or even that partitions or barriers be constructed to create the designated areas.

The draft standard also addresses IAQ generally. According to contacts at the Safety Division, the draft requires that heating, ventilating, and air conditioning (HVAC) systems be operated and maintained according to design specifications. The draft standard also requires that HVAC systems be kept "clean," broadly defined to mean that surfaces not be covered with dirt and dust, and that HVAC filters be changed "regularly." According to contacts at the Safety Division, the draft standard does not include recordkeeping requirements, which the Division acknowledges would be burdensome for employers.

In addition to the operation and maintenance requirements for general ventilation systems, the draft standard includes permissible exposure limits (PELS) for various indoor air constituents. Specifically, contacts informed me that the standard will establish PELs for VOCs, carbon dioxide, and humidity. Employers will not, however, be required to periodically measure exposure to these constituents. The Division does not plan to conduct programmed inspections for compliance with the PELs, instead only inspecting and monitoring in response to employee complaints.

Currently, the draft standard has been temporarily "shelved." The Division has shifted its focus to a different rule, regarding general enforcement measures, that it plans to promulgate prior to proposing the IAQ standard. Promulgation of that general enforcement rule should take 60 to 90 days. As soon as that rule is adopted, the Division plans to re-activate its consideration of the draft IAQ standard.

Remaining Procedural Steps:

Before the draft IAQ standard is officially proposed, it must be reviewed and approved by the Division's Standards Committee. The Standards Committee, a new creation, is comprised of one Safety Division official from each of the several Division offices throughout the state. Once approved by this Committee, the draft will be officially published for notice and comment as a proposed standard.

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After the publication of notice initiating rulemaking, the Agency must make available for public inspection and provide upon request, copies of the following materials;

(1) The text of the proposed rule, or any amendment, or repeal of any existing rule;

(2) A detailed written statement justifying the proposed rule;

(3) An economic impact statement;

(4) A statement comparing the proposed rule with any applicable federal rules, regulations or standards, or a statement that no comparable federal standards exist;

(5) The published notice.

Fla. Admin. Code. § 38A-3.027

If the proposed rule does not relate exclusively to organization, practice or procedure, the Agency must provide, upon request, a public hearing for presentation of evidence, argument and oral statements, within the reasonable conditions and limitations imposed by the Agency to avoid duplication, irrelevant comments, unnecessary delay or disruption of the proceedings. Written statements may be submitted to the agency following the hearing by any person, and may be considered and made a part of the record if authorized by the Agency. Fla. Admin. Code § 38A-3.030.

When no hearing is requested, and when the Agency chooses not to initiate a hearing on its own, the Agency may direct that the proposed rule be filed with the Department of State no less than twenty one (21) days following notice. Such direction may be given by the Agency head prior to initiating the proposed rule in the event no hearing is requested, or may be given after allowing fourteen (14) days in which affected persons may request a hearing. Fla. Admin. Code § 38A-3.030.

At either the conclusion of the public hearings or twenty one (21) days after official publication (if no hearings occur), the adopting agency then files the following documents with the

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Administrative Procedures Committee of the Legislature ("the committee")[1] at least 21 days prior to the proposed adoption date:

1) a copy of each rule it proposes to adopt;

2) a detailed written statement of the facts and circumstances justifying the proposed rule;

3) a copy of the estimate of impact; and

4) a statement of the extent to which the proposed rule establishes standards more restrictive than federal standards or a statement that the proposed rule is no more restrictive than federal standards or that a federal rule on the same subject does not exist.

Fla. Stat. § 120.54(11)(a).

As a legislative check on the agency, the Committee examines each proposed rule, and its accompanying material, for the purpose of determining whether:

(a) The rule is an invalid exercise of delegated legislative authority.

(b) The statutory authority for the rule has been repealed.

(c) The rule reiterates or paraphrases statutory material.

(d) The rule is in proper form.

(e) The notice given prior to its adoption was sufficient to give adequate notice of the purpose and effect of the rule.

(f) An economic impact statement was prepared that informs the public of the economic effect of the rule.

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[1] This Committee is composed of six (6) members appointed as follows: three members of the House of Representatives appointed by the Speaker of the House, one of whom must be a member of the minority party; and three members of the Senate appointed by the President of the Senate, one of whom must be a member of the minority party. Fla. Stat. § 11.60(1).

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(g) The rule is consistent with expressed legislative intent pertaining to the specific provisions of law which the rule implements.

(h) The rule is necessary to accomplish the apparent or expressed objectives of the specific provision of law which the rule implements.

(i) The rule is a reasonable implementation of the law as it affects the convenience of the general public or persons particularly affected by the rule.

(j) The rule could be made less complex or more easily comprehensible to the general public.

(k) The rule reflects the approach to the regulatory objective involving the lowest net cost to society to the degree consistent with the provisions of law which the rule implements.

(l) The rule will require additional appropriations.

Fla. Stat. § 120.545

After the committee has reviewed the proposed rule, it then consults with those legislative standing committees that have jurisdiction over the subject areas pertinent to any rule examined regarding legislative authority for the rule. If the committee objects to a proposed rule, it must, within 5 days of the objection, certify that fact to the agency whose rule has been examined and include with the certification a statement detailing its objections with particularity. Id.

Within 45 days of receipt of the objection, the agency must either:

1. Modify the rule to meet the committee's objection;

2. Withdraw the rule in its entirety; or

3. Refuse to modify or withdraw the rule.

Fla. Stat. §120-545(6).

Failure of the agency to respond to a committee objection to a proposed rule within forty-five (45) days will constitute withdrawal of the rule in its entirety. However, if the agency responds with a refusal to modify or withdraw the rule, the rule

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will become effective at the time of the agency's refusal. The committee may then file an editorial note regarding their objections which must appear in the Florida Register along with the promulgated rule. Id.

Judicial challenges to a rule promulgated by the Florida Department of Labor must be filed in the district court of appeal in the appellate district for Tallahassee, Florida. Fla. Stat. § 120.68.

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FLORIDA

January 1994 — Initial Draft of Proposed IAQ Standard Completed by Florida Division of Safety

Anticipated May 1994 — Submitted to Division's Standards Committee

Published in Florida Register for Notice & Comment

21-Day Minimum — Public Hearings (if requested)

Filed with Department of State

Filed with Administrative Procedures Committee of the Legislature — If Committee objects to proposed standard, then it is sent back to the agency.

Committee reviews rule with members of House and Senate Labor Committees

Agency can withdraw, modify or adopt rule (45 days).

Rule Adopted

Judicial Review

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Maryland

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MARYLAND DEPARTMENT OF LICENSING AND REGULATION'S RULEMAKING ON ETS

Status:

The Maryland Occupational Safety and Health (MOSH) Advisory Board is currently drafting a workplace smoking standard to recommend to the Commissioner of Labor and Industry. The MOSH Advisory Board has held two hearings and two public meetings on prohibiting smoking in the workplace, the most recent meeting having been held on February 2, 1994.

The Board has reached a consensus on recommending a standard that would restrict workplace smoking to designated areas with separate ventilation. Specifically, the recommendation will require that smoking rooms be ventilated at a specified rate (most likely 60 cubic feet per meter of outside air per person) and maintained at sufficient negative pressure to prevent migration of smoke from the room. Currently, Assistant Attorney General Elaine Patrick and Deputy Commissioner Ileana O'Brien are preparing the draft and an accompanying report.

The Board has scheduled another meeting for March 2, at which time the draft and report will be further refined. It is expected that a final draft recommendation and report will be approved by the Board at its April 2 meeting. At that time, the recommendation will be submitted to the Commissioner of Labor and Industry, who will decide whether to publish the recommendation as a proposed rule. The following analysis, which was prepared by David Smith in an earlier memorandum, addresses the remaining steps in the rulemaking process.

Remaining Procedural Steps:

The Board must submit to the Commissioner, with each recommendation for a proposed regulation, a report that explains the need for the proposed regulation and summarizes the information available to the Board. Id. at § 5-311. Also, the Commissioner may make any recommendation to the Board about a regulation that the Commissioner considers necessary to carry out the law. Id. at § 5-310(a)(2).

The Board or Commissioner may also appoint a "special committee," composed of employees, employers, experts, and at least one member of the general public, to help the Board develop its recommendations on proposed regulations. Id. at § 5-310(b). The Board may, but need not, hold public hearings on its proposals.

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Id. at § 5-310(d). If the Commissioner decides to adopt a Board proposal, he also may hold a public hearing.[1]

Section 10-124 of the State Government Code provides that before an agency adopts a proposed regulation, the agency shall evaluate whether the proposed regulation has any impact on businesses. Particularly, the agency proposing the regulation must "consider the costs that the proposed regulation would impose on each class [of affected business] and the difficulty of compliance for each class." Id. at § 10-124(b).

Also, all state regulations must be approved by the Maryland Attorney General before adoption. Id. at § 10-107. The Attorney General reviews the regulations for legality. Id. As mentioned above, the Attorney General drafted the proposed workplace smoking standard.

Another pre-condition to adoption of a regulation is its publication in the Maryland Register. According to the State Government Code, an agency may not adopt a proposed regulation until at least 45 days after its first publication in the Register. Id. at § 10-111(a). To have a proposed regulation published in the Register, the agency must submit two certified copies of the proposed regulation and a notice of proposed adoption to the Administrator of the Division of State Documents (the "Administrator"). Id. at § 10-112(a)(2)(ii). That notice must state the estimated economic impact of the proposed regulation on the revenues and expenditures of state agencies and local governments, as well as "groups such as consumer, industry, taxpayer, or trade groups." Id. at § 10-112(a)(3)(i). The notice must also provide for public comment by either scheduling a public hearing or providing a telephone number and address to which persons may comment. Id. at § 10-112(a)(3)(ii). Upon adoption of the regulation, the agency must submit a notice of adoption for publication in the Register. Id. at § 10-114.

The Administrator must also file the proposed regulation with the Maryland General Assembly's Joint Committee on Administrative, Executive, and Legislative Review (the "Committee"). Id. at § 10-112(a)(4). Although emergency temporary regulations proposed by state agencies, including the Division of

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[1] Section 5-312, regarding adoption of standards, provides, "A public hearing is not required to adopt, by reference, a proposed regulation that is identical to [another state agency's regulation, a national consensus standard, or a federal OSHA standard]." Id. at § 5-312(c) (emphasis added).

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Labor and Industry, must be approved by the Committee,[2] permanent regulations need not be approved. The Committee, nevertheless, may review proposed or adopted permanent regulations and make recommendations to the General Assembly. Md. State Gov't Code § 2-506. Since the General Assembly controls the "purse strings" of the agencies, Committee recommendations can effectively kill a regulation.

A person adversely affected or aggrieved by any regulation that the Commissioner adopts may file a complaint within 30 days after adoption of the regulation to have it modified of set aside. Md. Labor and Employ. Code Ann. § 5-215(a)(1). Such a complaint may be filed in the state circuit court for Baltimore City or the county where the employer has its principal office.[3] Id. at § 5-215(a)(2). Filing of a petition for review does not stay the operation of the standard. The court does, of course, have the power to issue a stay, but may do so only after a hearing. Id. at § 5-215(b). The Commissioner's findings of fact that are supported by substantial evidence are conclusive on the court, and the standard is deemed prima facie reasonable and lawful. Id. at § 5-215(c).

Besides the requirement that Maryland occupational safety and health standards be reasonably appropriate or necessary, state law imposes an additional requirement for standards that apply to a product distributed or used in interstate commerce and that differ from federal OSHA standards because of local conditions. Such standards must not "put an undue burden on interstate commerce." Id. at § 5-309(a)(2). This requirement is similar to the federal OSH Act requirement that state standards affecting certain types of products be justified by "compelling local conditions" and not "unduly burden" interstate commerce. 29 U.S.C. § 655(c)(2).

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[2] See Md. State Gov't Code Ann. § 10-111.

[3] According to the generally-applicable State Government Code, a person may file a petition for declaratory judgment on the validity of any regulation, whether or not the person has first asked the agency to consider the validity of the regulation. Md. State Gov't Code Ann. § 10-125(a). Such a petition may be filed in the circuit court for the county where the petitioner resides or has a principal place of business. Id. at § 10-125(a)(2). A court may determine the validity of any regulation if it appears to the court that the regulation or its threatened application "interferes with or impairs or threatens to interfere with or impair a legal right or privilege of the petitioner." Id. at § 10-125(b).

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MARYLAND

March 1994 — MOSH Advisory Board Considering Draft Workplace Smoking Standard.

Anticipated April 1994 — MOSH Advisory Board Recommends Standard to Commissioner of Labor & Industry.

MOSH Evaluates the Impact of the Recommended Standard on Businesses.

Attorney General Approval of Recommended Standard.

MOSH Decides to Officially Propose Standard.

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MARYLAND

MOSH Submits Proposal to AELR Committee.

(15 days)

MOSH Submits Proposal to Maryland Register

(15 days)

Notice and Text Published

Public Hearing (Optional)

(45 days)

AELR Delay - 75 days from publication or 30 days from notice of adoption

(2 weeks' notice to presiding officers)

Opposes regulation

(notice to MOSH and Governor - 5 days)

MOSH — withdraw / modify / appeal to Governor

decision — withdraw / modify / adopt

Submit Notice of Adoption to Maryland Register

(9 days)

Notice Published

(10 days)

Effective

Judicial Review (within 30 days of Adoption)

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Michigan

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MICHIGAN DEPARTMENT OF LABOR'S
DRAFT IAQ/ETS STANDARD

Status:

On January 13, 1994, the Michigan Occupational Health Standards Commission held a meeting regarding their proposed IAQ standard. This proposed standard adopts ASHRAE 62-1989 by reference. During the meeting, the Commission decided to place the proposed standard "on hold" for further information and discussion. The Commission plans to resume consideration of the proposal at its monthly meeting on April 17, 1994.

Currently, the Commission has no plans to address ETS, and will keep the old ETS proposal "shelved" until after they have completed the IAQ rulemaking. They have, however, stated that they plan to take another look at the ETS issue after finishing with IAQ.

Remaining Procedural Steps:

If the Commission adopts an IAQ standard at its April 17 meeting, then it must submit the proposed standard to the Legislative Service Bureau and the Department of the Attorney General for review. According to the Michigan Administrative Procedures Act (APA), the Legislative Service Bureau must approve all proposed rules as to "matters of form, classification, arrangement, and numbering," and the Attorney General must approve the legality of all proposed rules. If the Bureau or attorney general disapproves of the proposal it is sent back to the agency for amendment. The agency cannot adopt the rule in its current form unless either the bureau reconsiders its disapproval or the legislature adopts a concurrent resolution approving the rule within 60 days after the bureau's report.

If the Legislative Service Bureau and the Attorney General approve the proposal, the Commission submits the proposed IAQ standard to the Joint Committee on Administrative Rules (JCAR) for approval. JCAR is comprised of six members of the state senate and six members of the house of representatives, both groups being appointed for 2-year terms. The Commission also submitted a "Small Business Economic Impact Statement" to JCAR on the 1-page form provided by the latter.

Under the Michigan APA, JCAR may, but is not required to hold a hearing on a proposed rule. A concurring majority of the JCAR members from each house determine whether to approve a proposal. If JCAR does not approve a proposed rule, that rule may not be adopted unless one of the following occurs:

1. The legislature adopts a concurrent resolution approving the rule within 60 days after the JCAR report on the

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proposal has been received by, and read into the respective journal of, each house; or

2. JCAR subsequently approves the rule.

Once the proposal has been approved by JCAR or concurrent legislative resolution, the rule is filed with the Governor. At least 10 days later, the rule must be filed with the Secretary of State, at which time it becomes final. The rule becomes effective on the date fixed in the rule, or, if a date is not so fixed, on the date the rule is published in the Michigan Administrative Code. In either event, the rule may not become effective earlier than 15 days after having been filed with the Secretary of State.

Judicial challenges to a rule promulgated by the Michigan Department of Labor must be brought in the form of an action for declaratory judgment in the circuit court of the county where the plaintiff resides.

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MICHIGAN

January 1994	Occupational Health Standards Commission (OHSC) Meeting on Proposed IAQ Standard.	
Anticipated April 1994	Next OHSC meeting scheduled.	
	OHSC adopts standard.	
	("prompt")	
	Review by Legislative Services Bureau and Attorney General.	— If proposed standard disapproved, then it is sent back to the agency.
	(two months)	
	Review by Joint Committee on Administrative Rules (JCAR) (may hold public hearings).	— If proposed standard disapproved by JCAR, then it is sent back to the agency.
	Filed with the Governor.	
	(up to 10 days)	
	Filed with Secretary of State.	— OHSC begins reconsideration of ETS issue.
	(15 days)	
	Effective.	Judicial Review.

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Oregon

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OREGON OSHA'S
DRAFT IAQ/ETS STANDARD

Status:

According to Jack Pompeii, Director of Oregon OSHA, the agency has decided not to issue a proposed rule on IAQ/ETS and has instead chosen to wait until Federal OSHA adopts such a rule.

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Washington

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WASHINGTON DEPARTMENT OF LABOR'S
DRAFT IAQ/ETS STANDARD

Status:

According to Suzanne Mager, the Deputy Director of the Washington Division of Industrial Safety and Health (the "Division"), she plans to submit a proposed ETS standard to the Division's Director within the next few weeks. The proposed ETS standard, in its current form, requires designated smoking areas with separate ventilation and a dedicated outside exhaust. Ms. Mager has informed us that the Director will then officially adopt the proposal as a final ETS standard.

Remaining Procedural Steps:

The final ETS standard will take effect thirty (30) days after its adoption, unless the Division establishes that an earlier effective date is "necessary because of imminent peril to the public health, safety, or welfare." Wash. Rev. Code §34.05.380(2) and (3)(c); §49.17.240(3) . The standard may specify a later effective date only where the Director finds that delayed effectiveness of the standard is "reasonably necessary to afford the affected employers a reasonable opportunity to make changes in methods, means, or practices to meet the requirements of the adopted [standard]." §49.17.240(3).

The Washington Administrative Procedure Act ("APA") "establishes the exclusive means of judicial review of agency action." Wash. Rev. Code §34.05.510. Under the APA, a person has standing to obtain judicial review of an agency rule "if that person is aggrieved or adversely affected by the agency action." A person is "aggrieved or adversely affected" only if the three following conditions are present:

"(1) The agency action has prejudiced or is likely to prejudice that person;

(2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and

(3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action."

§34.05.530.

While a petitioner must exhaust all administrative remedies available before seeking judicial review, the petitioner need not have participated in the rule-making proceeding or have petitioned for its amendment or appeal. In addition, a court may

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relieve a petitioner of the need to exhaust administrative remedies if the remedies are inadequate, exhaustion would be futile, or grave irreparable harm would result from having to exhaust remedies and would clearly outweigh the public policy requiring exhaustion of remedies. §34.05.534.

Under §34.05.514 of the Washington APA, "Proceedings for review under this chapter shall be instituted by filing a petition in the superior court...for (a) Thurston county, [or] (b) the county of the petitioner's residence or principal place of business...." A petition for judicial review of a rule "may be filed at any time," except that petitions claiming failure to follow statutory rulemaking procedures must be filed within two years after the rule's effective date. § 34.05.542(1). The petition for review must set forth the following items:

(1) The name and mailing address of the petitioner;

(2) The name and mailing address of the petitioner's attorney, if any;

(3) The name and mailing address of the agency whose action is at issue;

(4) Identification of the agency action at issue, together with a duplicate copy, summary, or brief description of the agency action;

(5) Identification of persons who were parties in any adjudicative proceedings that led to the agency action;

(6) Facts to demonstrate that the petitioner is entitled to obtain judicial review;

(7) The petitioner's reasons for believing that relief should be granted; and

(8) A request for relief, specifying the type and extent of relief requested.

§34.05.546.

The APA also provides that an agency's rule "may be reviewed by petition for declaratory judgment filed pursuant to this subsection or in the context of any other review proceeding under this section." §34.05.570(2)(a). The APA further provides that "[t]he validity of any rule may be determined upon petition

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for a declaratory judgment addressed to the superior court of Thurston county.... The declaratory judgment order may be entered whether or not petitioner has first requested the agency to pass upon the validity of the rule in question." §34.05.570(2)(b).

In any challenge to the validity of an agency rule, a court shall declare the rule invalid only if it finds that the rule "violates constitutional provisions, exceeds the statutory authority of the agency, was adopted without compliance with statutory rule-making procedures, or could not conceivably have been the product of a rational decision-maker." §34.05.570(c).

There is only one case in Washington interpreting the APA provisions in challenging the validity of an agency rule. The Washington Supreme Court held in Neah Bay Chamber of Commerce v. The Department of Fisheries, 119 Wash.2d 464 (1992) that in reviewing the validity of an agency rule, the judicial review to be conducted is analogous to the federal courts' application of the arbitrary and capricious standard of review. As the court explained this standard, it represents a middle level of scrutiny between a de novo review where the court disregards the judgment of the agency and substitutes its own opinion and the lowest level of scrutiny in which the court determines only whether the agency's action was authorized by the state constitution and was procedurally correct.

In defining exactly what it meant by the arbitrary and capricious standard of review, the court relied on federal case law interpretation because the APA specifically provides that it was the state legislature's intent that the APA be interpreted in a manner consistent with other state and federal decisions. §34.05.001.

The Washington court relied on two United States Supreme Court decisions in its explanation of the standard of review. The court cited Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S.402, 416 (1971) for the proposition that a reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." The court also cited Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mutual Auto Ins. Co., 463 U.S.29, 43 (1983) as follows:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the

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> evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise....[We] may not supply a reasoned basis for the agency's action that the agency itself has not given. We will, however, 'uphold a decision of less than ideal clarity if the agency's [***14] path may reasonably be discerned.' [Emphasis added.]

The Neah Bay court concluded that the "product of a rational decision-maker" language in §34.05.570(2)(c) "involves an inquiry into the reasonableness of regulations analogous to the application of the arbitrary and capricious standard." In deciding whether an agency rule complies with this "product of a rational decision-maker test," the court set forth a three-part test which it stated was followed by federal courts:

(1) Is the agency's explanation of its rule clear?

(2) Did the agency use the appropriate statutory framework? Did it use correct factors in deciding the rule? Did it avoid improper factors?

(3) Could a decision-maker have reached the conclusion reached by the agency by some reasonable process?

The court further explained that "the validity of agency action is to be determined as of the time it was taken...[and that] while additional evidence of an agency's reasoning and the background materials relied upon may be presented on review, such evidence is only admissible to explain the agency's decision at the time." Finally, the court noted that it did not foresee "the need for additional testimony in the majority of cases. Thus, the review of the agency rule is apparently intended to consist of a review of the agency record with briefs from the parties.

In addition to judicial review, §34.05.630 of the APA provides for "selective" legislative review of existing rules. This review is conducted by the Joint Administrative Rules Review Committee, a bipartisan committee consisting of four senators and four representatives from the state legislature. § 34.05.610(1).

If a majority of the Rules Review Committee finds: "(a) [t]hat an existing rule is not within the intent of the legislature as expressed by the statute which the rule implements, (b) that the rule has not been adopted in accordance with all applicable provisions of law, or (c) that an agency is using a policy statement, guideline, or issuance in place of a rule," the

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Committee may require the agency to hold a public hearing on such finding. §34.05.630(3). Where, after holding a public hearing on the Committee's objections, the agency fails to modify the rule to conform to with the intent of the legislature, the Committee may, by two-thirds vote, recommend suspension of the rule. §34.05.640(3). The governor then has thirty (30) days to approve or disapprove the recommended suspension. Id. If the suspension is approved by the governor, it is effective from the date of that approval and continues until ninety days after the expiration of the next regular legislative session. Id.

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WASHINGTON

Anticipated March 1994 —— Division of Industrial Safety and Health Publishes Notice of Final Adoption of ETS Standard

Judicial Review and Motion for Stay

Anticipated April 1994 —— Effective

"Selective" Legislative Review by Joint Administrative Rules Review Committee

Majority of Rules Review Committee Opposes Standard

Public Hearing By Division on Committee's Objections

Division Fails to Conform Standard to Satisfaction of the Committee

2/3 Vote of Committee to Recommend Suspension of Standard

Governor Approves or Disapproves Suspension

If Approved by Governor, Suspension Effective for 90 Days After Expiration of Next Regular Legislative Session

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